No. 10961

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS W. NEALON,

Appellant,

vs.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,

Appellee.

BRIEF FOR APPELLEE

Upon Appeal from the District Court of the United States for the District of Arizona

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No. 10,961

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS W. NEALON,

Appellant,

vs.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,

Appellee.

BRIEF FOR APPELLEE

Upon Appeal from the District Court of the United States for the District of Arizona

JURISDICTION OF DISTRICT COURT

The statute believed to sustain jurisdiction of the District Court is Section 41, Title 28, U.S.C.A., for the reason that the original proceeding in the District Court was in the nature of a class suit where the matter in controversy exceeded, exclusive of interest and costs, the sum of $3,000 and was between citizens of Arizona and a citizen of the

State of Utah (*Intermountain Building & Loan Association, a Utah corporation v. Gallegos, et al.,* 78 Fed.(2) 972).

The District Court under the same section had jurisdiction to enter the final order of December 7th, 1942 (243).

As will be shown in the argument and by the record herein, we believe that the District Court had no jurisdiction by virtue of the petition filed by appellant on March 31, 1944 (599-619).

JURISDICTION OF CIRCUIT COURT OF APPEALS

The statute believed to sustain appellate jurisdiction in so far as the class suit and the final order of December 7th, 1942, are concerned, is Section 225, Title 28, U.S.C.A.

Appellee believes, however, that by virtue of the record here this Honorable Court is without jurisdiction, except to dismiss the attempted appeal, for the reasons stated in the argument, *infra,* and, in any event, because an appeal cannot be taken from a final order where appellant has accepted the benefits thereof; a bill of review will not lie for the same reason.

STATEMENT OF THE CASE

The statement of the case set forth in the brief of appellant is substantially correct but we believe that a step by step statement will more materially aid this Honorable Court in passing on the questions presented by this appeal.

On October 17th, 1937, appellant filed in the court below his petition for allowance of attorney's fees for legal serv-

ices rendered and expenses incurred (108-164). That petition, for all practical purposes, is substantially the same as the petition thereafter filed by Elizabeth G. Monaghan (43-108), and previously considered by this Court.[1]

On December 20th, 1937, a hearing was had on the petition filed by appellant here, at the conclusion of which hearing, both the petitions of appellant and Monaghan were, by the Court, taken under advisement (593).

On the day of the hearing, appellant filed a petition for payment of out-of-pocket expenses paid by him (593), and on the same day filed a separate petition for allowance and payment of $12,500 upon account of fees (594).

Thereafter, and on February 18th, 1938, the Court below made its order allowing appellant $5,000 and authorized, empowered and directed the Receiver to pay said sum of $5,000 and, in said order, retained jurisdiction "to make and enter such other and further order in the premises as to it shall seem just and equitable" (595-596).

On March 3rd, 1939, the Court entered a further order for allowance and payment of attorney's fees for legal services rendered by appellant reciting the allowance of February 18th, 1938, of $5,000 and ordering an additional $2,500 allowed to appellant on account and authorizing, empowering and directing the Receiver to pay such additional sum of $2,500. The Court likewise in the order of March 3rd, 1939, retained jurisdiction "to make such other and further order in the premises as to it may seem just and equitable" (597-598).

1. *Monaghan v. Hill,* 9 Cir. 140 Fed.(2) 31.

Thereafter, and on the 7th day of December, 1942, the Court below entered its "Final Order Fixing Attorney's Fees and Expenses and Ordering Payment of Balance Due Thomas W. Nealon" (243-248), in which final order there was recited the payments of $5,000 in February, 1938, and $2,500 additional in March, 1939, and fixing the total fees of both Monaghan and Hill at $25,000, and awarding appellant one-half (½) of said sum, less the $7,500 theretofore paid him on account, pursuant to orders of Court.

In the final order of December 7th, 1942, a further allowance of $1,330.40 was made appellant to cover out-of-pocket expenses claimed by him and established to be due at the hearing held on December 20th, 1937.

There was further recited in that order that between the dates of December 1st, 1935 and April 1st, 1937, appellant received $7,344 covering salary and expenses as one of the attorneys for the former Receiver, Henry S. McCluskey. The balance of the fee allowed appellant, to-wit, $5,000, and the out-of-pocket expenses amounting to $1,330.40, were ordered paid by the Receiver, and appellant was decreed to have a lien upon the assets of the Loan Association until such sums were paid. It was

> "Further Ordered, Adjudged and Decreed * * * that this is a final allowance and covers all services heretofore rendered by said Thomas W. Nealon as set forth in his petition and as attorney for the former Receiver."

Subsequent to the entry of the final order of December 7th, 1942, and on the 10th day of December, 1942, and in accordance with such final order, the Receiver paid to

appellant, and appellant accepted from the Receiver, $6,330.40, covering the following items specified in the voucher check (642), to-wit:

"Date of Invoice No.	Items	Amount	Total
B-202—	Final Payment in Full Settlement of Attorney Fees Per Order of Court of December 7, 1942	$5,000.00	
	Expenses Allowed Per Order of Court of December 7, 1942	1,330.40	
			$6,330.40"

Said check bore the following endorsement (643):

"Endorsement

Endorsement of this check acknowledges payment in full for all of the invoices listed on the voucher on the reverse side of this check.

Thomas W. Nealon"

There is no denial that appellant cashed the voucher check referred to and accepted and retained the full benefits and fruits of the final order of December 7th, 1942. The final order was based on an *unliquidated* claim.

Nothing further was heard from appellant until March 31st, 1944, some fifteen (15) months and twenty-one (21) days after the actual receipt of the payment made by the Receiver pursuant to such final order, when appellant filed a document in the court below entitled:

> "Petition of Thomas W. Nealon requesting this honorable Court to review and rehear final order fixing attorney's fees and expenses of Thomas W. Nealon, made and entered herein on December 7, 1942" (599).

The prayer of said petition is:

"(a) That the order of this Court entered herein on December 7, 1942, allowing and awarding to petitioner compensation and expenses in the amount therein recited, be vacated for the want of jurisdiction of this Court to render said order, and that a supplemental order be made and substituted therefor by this Court allowing and awarding to petitioner compensation in such amount as now appears from the entire record herein to be right and proper.

(b) That this Court, as in the nature of a bill of review, or by an original bill in equity, review said petition filed herein by petitioner on October 15, 1937, and said order entered herein on December 7, 1942, and upon such review that this Court correct the errors of law and fact *apparent in said order,*[2] and thereupon allow and award to petitioner compensation in such amount as now appears from the entire record herein to be just and proper.

(c) That this Court grant a rehearing of said order entered herein on December 7, 1942, awarding compensation to petitioner, and upon such rehearing that this Court thereupon allow and award to petitioner compensation in such amount for all services performed by petitioner as now appears from the entire record herein to be just and proper.

(d) That this Court modify and revise said order entered herein on December 7, 1942, so as to allow and award compensation to petitioner for all services performed by petitioner as now appears from the entire record herein to be just and proper (618).

(e) (Immaterial)

2. Emphasis ours throughout this brief, unless otherwise noted.

(f) And for such other and further relief as may appear just and equitable." (619).

In the meantime, and on January 21st, 1944, this Honorable Court in *Monaghan v. Hill,* 140 Fed.(2) 31, held that the $12,500 allowed Mrs. Monaghan was insufficient and that she was entitled to "such a fee as to the District Court may seem right and proper but in a sum not less than $50,000."

It was after this decision that the appellant apparently decided that he had probably made a mistake by not appealing from the final order of December 7th, 1942, as did Mrs. Monaghan, and he is now trying to set aside that final order from which, until now, he has taken no appeal.

It is admitted that no appeal was taken within the time required by law, nor was any action whatsoever taken by appellant until March 31st, 1944 (page 13, Brief of Appellant).

On January 28th, 1936, the court below (Judge Jacobs presiding) entered an "Order for Monthly Allowance of Attorney Fees to Thomas W. Nealon", in which order the then Receiver, H. S. McCluskey, was "authorized and directed to pay to said Thomas W. Nealon, the sum of $300.00 and $159.00 per month for expenses, for his services as such attorney, up to the first day of January, 1936, and a like amount on the first day of each and every month on account thereafter until further orders of this Court" (385-386).

Prior to the date of that order, and on November 30th, 1935, the Court had entered an order appointing Thomas W. Nealon and Elizabeth G. Monaghan attorneys for the

then Receiver (386) and on the same date as the order fixing appellant's fees, the Court fixed the fees of Elizabeth G. Monaghan at $250.00 a month (384).

On the date that the orders were entered fixing the fees of Monaghan and appellant, the Court entered a further order appointing an additional attorney for the Receiver and naming John L. Gust as such additional attorney (386), and the Court fixed Mr. Gust's allowance as $300.00 a month "until further orders of this Court" (389).

After the appellant filed his petition on March 31st, 1944 (599), the appellee filed his answer (632), the first two defenses of which questioned the jurisdiction of the Court, and the third defense alleged that the petition "fails to state a claim upon which relief can be granted". The fourth defense was a categorical answer to the petition. The fifth, sixth and seventh defenses go to the payment of the money awarded by the order of December 7th, 1942, and the acceptance of such money by the appellant.

An order was made following a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure (643), which order was dated June 7th, 1944.

On November 21st, 1944, appellant filed a "Motion to Submit Petition" (651), and on the 22nd day of November, 1944, appellee filed a "Motion for Order Denying Petition and Dismissing Same" (653).

Briefs were filed, and on the 22nd of November, 1944, a stipulation was entered into to submit both motions on briefs without oral argument (652), and an order was made that the motions "be and the same are hereby submitted for decision" (653).

On November 22nd, 1944, the Court, by minute entry, made the following order:

> "It is Ordered that the Receiver's Motion for an Order Denying Petition of Thomas W. Nealon requesting this Honorable Court to review and rehear final order fixing attorney's fees and expenses of Thomas W. Nealon, made and entered herein on December 7, 1942, and dismissing same be and it is granted". (655-656).

On November 29th, 1944, attorneys for appellant and appellee were present in Court, and the appellant stated he desired the record to show that he declined to amend or plead further in the case (657), whereupon the Court entered its "Final Order Denying Petition and Dismissing Same" (657-658), in which it was, among other things,

> "Ordered, Adjudged and Decreed that the petition of Thomas W. Nealon filed herein on March 31st, 1944, be denied and the same is hereby dismissed with prejudice" (658).

The appeal is taken

> "* * * from that certain order made and filed herein on December 7, 1942, entitled: "Final Order Fixing Attorney's Fees and Expenses, and Ordering Payment of Balance Due Thomas W. Nealon," and entered herein on the Clerk's Docket on December 7, 1942.
>
> "The said Thomas W. Nealon also appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain order made and filed herein on November 29, 1944, entitled: 'Final Order Denying Petition and Dismissing Same,' and entered herein on the Clerk's Docket on November 29, 1944" (666).

SUMMARY OF THE ARGUMENT

Appellee's argument will be divided into subheads, which necessarily will cover the eight specifications of error set forth in the brief of appellant and will likewise present appellee's reasons why the appeal taken by appellant should be dismissed or the order denying the petition and dismissing same affirmed.

Appellee presents for this Honorable Court's consideration, the following reason why this appeal should be dismissed, or, in the alternative, that the order of the court below denying petition and dismissing same (657), on the grounds set forth in the motion filed by appellee (653-655), should be affirmed:

(a) An order or decree which adjudges that an attorney is entitled to compensation in a definite amount and allows a lien therefor on a fund in court and directs payment, is a final order and appealable although no final disposition is made of the residue of the fund.

(b) Appellant in his attempted appeal from the order of December 7th, 1942, is too late, as an appeal from such an order must be taken within three (3) months from the entry thereof.

(c) The order of November 29th, 1944, is not a final decision within the meaning of Section 128(a) of the Judicial Code, 28 U.S.C.A., Section 225(a) and is not appealable.

(d) An attorney accepting the benefits of a final order or judgment and retaining the fee allowed thereby, cannot thereafter appeal therefrom.

(e) A bill of review, or a bill in the nature of a bill of review, will not lie in this case because appel-

lant, having accepted the benefits of the order of December 7th, 1942, is now estopped from reviewing same; he cannot accept its benefits and escape from its burdens.

(f) A bill of review for errors apparent on the face of the record will not lie after the time allowed for appeal has elapsed.

(g) A bill of review, or a bill in the nature of a bill of review, will not lie where no fraud is alleged, or where there is no newly discovered evidence claimed, unless there is error apparent on the face of the record.

(h) The time for considering a judgment or order that has become final cannot be extended unless a motion to review, rehear, modify, revise or vacate such order has been seasonably filed and that an unseasonably filed motion or petition, although it may be considered on its merits, cannot have the effect of extending the time to appeal from the original order or judgment.

(i) A motion for rehearing or a motion for a new trial must be filed seasonably and within the time provided by the Rules of Civil Procedure.

(j) Lack of diligence in filing petition.

(k) The failure of the Court to find the facts specially and state separately its conclusions of law thereon as provided by Rule 52 does not make the judgment void.

ARGUMENT

(a) An Order or Decree Which Adjudges That An Attorney Is Entitled to Compensation in a Definite Amount and Allows a Lien Therefor on a Fund in Court, and Directs Payment, Is a Final Order and Appealable Although No Final Disposition Is Made of the Residue of the Fund.

The first and second defenses in the Receiver's answer go to the jurisdiction of the lower court to consider the petition. The third defense is that the petition fails to state a claim upon which relief could be granted.

We are firmly convinced that the petition on its face shows, as a matter of law, that it was correctly denied and ordered dismissed.

It will be noted that appellant questions the finality of the order of the Court entered December 7th, 1942, and claims in his petition that said order was an "interlocutory administrative order in equity" now subject to control and revision by this Court and he seeks, apparently, a new or supplementary order "which allows and awards to petitioner just and proper compensation for all services performed by petitioner, as set forth in the petition filed by him on October 15, 1937, as supplemented, and in this petition, and by the record herein".

If appellant was dissatisfied with the fee allowed him in the Court's order of December 7th, 1942, he should have appealed therefrom within the time provided by statute to perfect his appeal, inasmuch as the order entered was final.

> *Monaghan v. Hill,* 9 Cir., 140 Fed.(2) 31, 33;
> *Trustees v. Greenough,* 105 U.S. 527.

In *Cyclopedia of Federal Procedure* (2nd Ed.), Volume 10 at page 252, it is said to be the law that,

"An order relating to attorney's fees and disbursements is appealable where a final decision, but not otherwise, as where it is in one of its substantial parts reserved for further adjudication. *A decree which adjudges that an attorney is entitled to compensation in a definite amount and allows a lien therefor on a fund in court, and directs payment, is appealable although no final disposition is made of the residue of the fund.*"

Trustee v. Greenough, supra, was a case where fees were applied for where a fund was brought into court and one of the questions presented was whether the order fixing these fees amounted to a *final decree* and the Supreme Court of the United States, speaking through Mr. Justice Bradley, said:

"The first question, however, is whether these orders do or do not amount to a final decree, upon which an appeal lies to this court. They are certainly a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision. The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but under all the circumstances, we think that the proceeding may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal." (105 U.S. page 531)

See, also:

Reeves v. Beardall, 316 U.S. 283; 62 Sup. Ct. 1085;
Dexter Horton National Bank of Seattle v. Hawkins, et al. (9 Cir.), 190 Fed. 924;
Gripton v. Richardson (9 Cir.), 82 Fed.(2d) 313;
Gelberg v. Richardson (9 Cir.), 82 Fed.(2) 314, 315.

In *Gripton v. Richardson, supra,* this Court, speaking through Judge Mathews, held that although a decree confirming a Special Master's Report did not terminate the Receivership proceeding, still,

> "* * * decree determined appellant's rights by allowing her claim in part only and refusing to treat it as a secured or preferred claim. Such a decree is 'final', within the meaning of Section 128 of the Judicial Code, as amended, 28 U.S.C.A., Section 225, and is, therefore, appealable. (Citing cases)."

In the case following, *Gelberg v. Richardson,* on page 315, this Court, in passing on the finality of the decree rejecting the claim of an attorney for a committee of the corporation's creditors against the corporation's receiver for attorney's fees and services rendered the receivership proceeding, held that the decree was a "final decree" within the meaning of Section 225, Title 28, U.S.C.A., although such decree did not terminate the receivership proceeding.

Both the *Gripton* and the *Gelberg* cases, *supra,* cite *Dexter Horton National Bank v. Hawkins, supra.*

In *Tuttle v. Claflin* (2 Cir.), 88 Fed.(2) 122, it is held in effect that a decree entered in a proceeding by attorneys to enforce a lien for their fees, which adjudged that they

are entitled to compensation in a definite amount, and to have a lien therefor on a fund in court, and directs payment thereof, is a final appealable decree although the residue of the fund may not have been finally disposed of.

See, also:

Jacksonville T. & K. W. Ry. Company, et al. v. American Construction Company, et al. (5 Cir.), 57 Fed. 66;

Ruggles, et al. v. Patton (6 Cir.), 143 Fed. 312;

Central Trust Co. of New York v. United States Light & Heating Co., et al. (2 Cir.), 233 Fed. 420;

Sawyer v. Ellis, et al., 36 Ariz. 419, 286 P. 189.

It will be seen, therefore, that the order of December 7th, 1942, allowing appellant attorney's fees in this matter was *a final order* as a matter of law.

These cases are not to be confused with cases like *Heinz v. Butte and Boston Consolidated Mining Company,* 129 Fed. 337, and *Colley v. Wolcutt,* 187 Fed. 595. In the *Heinz* case, there was *an interlocutory order* confirming a receiver's report and directing the receiver to pay expenses incurred by him before the coming on of his final account. This was held not a final order. In the *Colley* case, an allowance was made for services of attorneys but the order provided that the allowance should be thereafter paid in such manner *as the court should direct.* This was held *not to be a final order.* Neither of these cases portray the situation in the case at bar.

(b) Appellant in His Attempted Appeal From the Order of December 7th, 1942, Is Too Late, As An Appeal From Such An Order Must Be Taken Within Three (3) Months From the Entry Thereof.

The attempted appeal from the order of December 7, 1942 (243), is too late because the order became final and the time to appeal expired three (3) months after the entry of the order.

Monaghan v. Hill (9 Cir.), 140 Fed.(2) 31, 33;
U. S. C. A., Sec. 230, Title 28.

This is not applicable, however, if a timely petition to vacate order or rehear same is filed (*Mitchell v. Maurer* (9 Cir.), 67 Fed.(2) 286).

(c) The Order of November 29th, 1944, Is Not a Final Decision Within the Meaning of Section 128(a) of the Judicial Code, 28 U.S.C.A., Section 225(a) and Is Not Appealable.

That part of the appeal directed to the order of the Court entered on November 29th, 1944 (666), is not, in appellee's judgment, an appealable order within the meaning of Section 225(a), Title 28, U.S.C.A.

Donavan v. Jeffcott, et al. (9 Cir.), 147 Fed.(2) 198, and cases therein cited;
10 *Cyc. Fed. Proc.* (2nd Ed.), Sec. 4892, page 279;
Cobbledick v. U. S., 309 U.S. 323, 60 S. Ct. 540.

(d) An Attorney Accepting the Benefits of a Final Order or Judgment and Retaining the Fee Allowed Thereby, Cannot Thereafter Appeal Therefrom.

In Paragraph X of the petition to review and rehear final order fixing attorney's fees, etc., it is definitely alleged that in accordance with the order entered on De-

cember 7th, 1942, that appellant accepted the balance of Five Thousand ($5,000.00) Dollars authorized by said order, plus the further sum of $1,330.40 expenses (605, 606). It is further alleged in that paragraph that between December 1st, 1935, and April 1st, 1937, appellant had been paid an additional sum of $7,344.00 in monthly payments *as and for a drawing account.* The seventh defense in the Receiver's answer sets forth the check covering the attorney's fees and expenses (642), which check bore on its reverse side the notation and endorsement set forth in the statement of the case, *supra.*

At the pre-trial conference, it was readily admitted by appellant that the money was paid to, and received by him pursuant to the order but it was contended that such order was not a final order. Of course, this latter statement by appellant is not borne out by the law.

It is the general rule (adopted in Arizona)[3] that a party cannot accept the benefits of a judgment, order or decree and afterward prosecute an appeal or writ of error to review the same; and that he cannot, in case of interdependent provisions, accept the benefits of the part which is favorable and appeal from the part which is unfavorable; nor can he, in making such acceptance, reserve the right to appeal (4 *C.J.S., "Appeal and Error",* Paragraph 215, page 414).

In the same volume of *Corpus Juris Segundum,* in Paragraph 216, under the heading "Acceptance of Payment", it is said in effect that a party cannot prosecute an appeal or writ of error to reverse a judgment or decree after

3. *Shannon Copper Co. v. Potter,* 14 Arizona 481, 131 Pac. 157.

having acquiesced therein by voluntarily accepting money tendered by the judgment debtor in discharge of the judgment and that "this rule is particularly true *where the money is accepted in complete settlement and satisfaction of the judgment*".

In 2 *American Jurisprudence*, Paragraph 214, page 975, it is stated as a general rule that *a litigant who has, voluntarily and with knowledge of all the material facts, accepted the benefits of an order, decree or judgment of a court, cannot afterwards take or prosecute an appeal* or error proceeding to reverse it, and that generally no distinction is made between a judgment at law or a decree in equity, and, as stated by the author in *American Jurisprudence, supra:*

> "* * * —in other words, that the right to proceed on a judgment and enjoy its fruits and the right to appeal therefrom are totally inconsistent positions, and the election to pursue one course must be deemed an abandonment of the other."

Of course, *the mere tender* of the benefits of a judgment, which is refused, does not operate as an estoppel (2 *Am. Jur.*, page 977).

In *Smith v. Morris, et al.* (3 Cir.), 69 Fed(2) 3, it was held that the right of an attorney to appeal from an order allowing a fee, was waived by the attorney's accepting and retaining fee allowed by the order, on the theory that *one accepting the benefits of a judgment or decree is estopped from thereafter reviewing it and escaping from its burdens.* In this particular case, Smith made an application for allowance of fee to a law firm and himself

jointly, and the Court allowed him separately a fee of $5,000.00 "as full and final compensation for his services as counsel for the Receivers". Mr. Smith accepted the $5,000 and thereafter appealed. The Receivers moved to dismiss the appeal, which was granted, and the Court, in passing on the matter, had this to say:

> "We think there are two other questions which stand out from the record, and that a ruling on one or the other takes precedence over all else. The first is:
>
> > Whether an attorney for a receiver has a right to appeal from a discretionary order of the court awarding attorney fees in the administration of an estate where no abuse of discretion is alleged?
>
> "We pass by that question (Stuart v. Boulware, 133 U.S. 78, 10 S.Ct. 242, 33 L.Ed. 568) and come to one *which is not debatable.* That question arises on the receivers' motion to dismiss the appeal and may be stated thus:
>
> "If there is in any case a right of appeal in a matter of fees, whether Mr. Smith has waived that right by accepting and retaining the fee allowed him by the order appealed from?
>
> "Actually, Mr. Smith is appealing from the whole order. Although it contains two paragraphs, one denying the allowance of joint fees, the other allowing Mr. Smith a separate fee, it is but one order, the two paragraphs being related and consistent one with the other. Mr. Smith is endeavoring to appeal from that part of the order which denied his contention that he is a joint solicitor with Richards, Layton and Finger, and, accordingly, denied him an allowance as such, while at the same time he is retaining the benefits of the order by which he, separately, was allowed, and

paid, $5,000, with the allowance distinctly marked 'as full and final compensation for his services.' In doing this, he is confronted by a rule of law, than which none is better settled, that one 'who accepts the benefits or any susbtantial part of the benefits of a judgment or decree is thereby estopped from reviewing and escaping from its burdens.' He cannot avail himself of its advantages, and then question its disadvantages in a higher court. (Citing cases.)

"Only recently this court had occasion to apply this rule in United Engineering & Foundry Co. v. Cold Metal Process Co., 68 Fed.(2) 564, where the trial court had held the patent sued upon valid yet dismissed the bill for infringement because of an outstanding and valid license held by the defendant thereunder. Holding on to that part of the decree which bestowed upon it the benefits of the license, the defendant, in substance, appealed from the other part of the decree which it did not like. The Court dismissed the appeal. While there was involved in that case a principle of patent law not involved in this case, the theory on which the appeal was dismissed is the same."

See, also:

Altman v. Shopping Center Bldg. Co., et al. (8 Cir.), 82 Fed.(2) 521 at 527;

Re Greenpoint Metallic Bed Co. Inc. (2 Cir.), 113 Fed.(2) 881, 884.

In *Kaiser v. Standard Oil Co. of New Jersey* (5 Cir.), 89 Fed.(2) 58, it was said, in holding that the accepting of fruits of judgment and thereafter appealing therefrom are totally inconsistent positions and that the election to pursue one course is deemed an abandonment of the others:

"Accepting the fruits of a judgment and thereafter appealing therefrom are totally inconsistent positions, and the election to pursue one course is deemed an abandonment of the other. What, if anything, was due libelant for maintenance and cure was a controverted question below. Libelant having accepted the benefits of that separable portion of the decree, he is estopped to now question it in that respect. He will not be heard to both approbate and reprobate as to the same matter."

See, also:

Albright, et al. v. Oyster, et al. (8 Cir.), 60 Fed. 644;

Oriole Phono. Co. v. Kansas City etc. (8 Cir.), 34 Fed.(2) 400, 401, second column.

In the *Oriole* case, *supra,* the question of payment of a definite sum due in any event, is discussed.

In *Shannon Copper Co. v. Potter,* 14 Ariz. 481, 131 Pac. 157, the Supreme Court of Arizona, in a case involving a settlement of a judgment, held:

"The law is well settled that a party cannot receive satisfaction of a judgment in his own favor and thereafter prosecute his appeal from the same judgment in the hope of obtaining a more satisfactory one. (Citing cases) * * * We think the settlement of the judgment extinguished all the matters in controversy between the parties to this appeal and leaves nothing for the decision of this court. * * * For the reasons stated, viz., that the judgment is admitted by appellant to have been settled since the trial of the cause, the appeal is dismissed."

See, also:

Denney v. Fort Recovery Banking Company (7 Cir.), 135 Fed.(2) 184, 186;
13 *Am. Dec.* 548;
In re Hamlin (4 Cir.), 40 Fed.(2) 852, 855.

In *Cyclopedia of Federal Procedure* (2nd Ed.), Volume 10, at page 503, can be found a statement concerning payment under a judgment or decree and the acceptance of benefits thereunder which states the exceptions, which exceptions are inapplicable here.

If one cannot appeal under the situation presented in this case, certainly he cannot, after the time for appeal has expired and after the lapse of fifteen (15) months thereafter, ask for a rehearing and a new award.

Appellee believes it to be clear that if appellant can recover in the present action, he must do so through a bill of review and not a motion for a rehearing. A motion for a rehearing is tantamount under the Rules of Civil Procedure to a motion for a new trial, and, being filed more than fifteen (15) months after the final appealable order of December 7th, 1942, is too late.

A bill of review is an independent action to correct a judgment and requires service of process as any other new action (*Zegura v. U. S.* (5 Cir.), 104 Fed.(2) 34; 19 *Am. Jur.*, page 291).

If this were a new action *brought in the state courts of Arizona,* appellant indubitably would be foreclosed because, having accepted the benefits of the final order of December 7th, 1942, and having retained same, he could not now prosecute his appeal from the same order in the

hope of obtaining a more satisfactory one. In short, the settlement of the order extinguished all matters in controversy between the parties to this appeal and leaves nothing for the decision of this Honorable Court.

Shannon Copper Company v. Potter, supra;
Nowland, et al. v. Vinyard, 43 Ariz. 27, 29 Pac. (2) 139, 141;
Frankel v. Frankel, 41 Ariz. 396, 18 Pac.(2) 911, 913;
Webb v. Crane Co.,[4] 52 Ariz. 299, 80 Pac.(2) 699, 708.

In short, the present action, if successful, would permit a recovery by the appellant in the Federal court which would be denied him in the state court, thereby defeating the purpose of Section 725, Title 28, U.S.C.A., sometimes known as the "State Law Conformity Act".[5]

The purpose of this Act, as stated in the unanimous opinion by Mr. Justice Stone (now Chief Justice) in *West v. American Telephone and Telegraph Company,* 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139, is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts and the other to be availed of in Federal courts only in case of diversity of citizenship; and in *Fidelity Union Trust Co., et al. v. Field,* 311 U.S. 169, 61 S.Ct. 176, former Chief Justice Hughes, in a unanimous opinion, reversed the Cir-

4. *The Crane Co.* case shows a distinction where payment is compulsory.

5. Section 725, Title 28, U.S.C.A., reads: "The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

cuit Court of Appeals for the Third Circuit (108 Fed.(2) 521), the same result being reached. The Court, in that opinion, cited *Erie Railroad Company v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, and *Ruhlin v. New York Life Ins. Co.,* 304 U.S. 202, 58 S.Ct. 860, 82 L.Ed. 1290. (Compare: *Sampson v. Channell* (1 Cir.), 110 Fed.(2) 754; 3 *Cyc. Fed. Proc.* (2d Ed.), Sec. 648, page 180, ex etc.; *Meredith, et al. v. City of Winter Haven,* 320 U.S. 228, 64 S.Ct. 7; *Peterson v. Chicago Great Western Ry. Co.* (8 Cir.), 138 Fed.(2) 304; *Moore, et al. v. McDuffie, et al.* (9 Cir.), 71 Fed.(2) 729; *Douglass, et al. v. Thurston County* (9 Cir.), 86 Fed.(2) 898; *Pierrepont v. Fidelity-Philadelphia Trust Co.* (DC Penn.), 32 Fed.(2) 608; *Palmer v. Hoffman,* 318 U.S. 109, 63 Sup. Ct. 477, 482.)

Appellant's right of recovery is a substantive matter and not a procedural one and hence is governed by the state law. It has been held by this Honorable Court that the burden of proof in a case is substantive (*New York Life Ins. Co. v. Rogers,* 126 Fed.(2) 784, 788; *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.,* 313 U.S. 487, 61 Sup.Ct. 1020).

In *Montgomery Ward & Co. v. Callahan* (10 Cir.), 127 Fed.(2) 32, it is held that the right to recover is a substantive right (page 36) and is therefore controlled by the laws of the state, citing the *Erie Railroad Company v. Tompkins* case, *supra.* In the *Montgomery Ward & Co.* case, *supra,* it was held that whether *an executed release could be set aside for mutual mistake must be determined by the state laws and decisions.*

In 36 *Corpus Juris,* Section 27, page 963, it is said, in differentiating between substantive and adjective law that

> "substantive law is that part of the law which creates, defines and regulates rights, as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion."

See, also:

Green v. Term. R. Asso., etc., 135 S.W.(2) 652.

In *Waldron v. Aetna Casualty & Surety Co.* (3 Cir.), 141 Fed.(2) 230, 234, in holding that in diversity cases, party's substantive rights must be determined according to applicable local law, and that while questions of evidence relate to matters of procedure that the sufficiency of the evidence goes to the maintenance of the substantive right and is, therefore, to be tested by local law in cases where such law controls.

In equity receivership cases *depending on diversity of citizenship,* it appears that claims are allowable and assets are distributable according to the laws of the state.

Prudential Insurance Company of America v. Land Estates, Inc. (2 Cir.), 110 Fed.(2) 617;
3 *Cyc. Fed. Proc.* (2d Ed.), Section 613, page 100.

In *Biddle, et al. v. Cox Lime, Stone & Lime Products Corporation* (D.C. Penn.), 47 Fed. Supp. 570, it is held that in a Federal court equity receivership which is not a bankruptcy proceeding, the state law was controlling as to fixing a tax lien within the statutory period, citing *Erie Railroad Company v. Tompkins, supra.*

The Federal courts in diversity cases look to the state decisions to determine what is due on a judgment (3 *Cyc. Fed. Proc.* (2d Ed.), Section 618, page 107).

It will be seen from an examination of the authorities that the law to be applied by Federal courts in diversity cases is the law of the state except in matters governed by the Federal constitution, or by acts of Congress.

If the Conformity Act, which has been greatly broadened by the *Erie Railroad* case, *supra,* has any application here, and we believe it has, appellant is definitely foreclosed by virtue of the decision of the Supreme Court of Arizona in the *Shannon Copper Company* case, *supra.* He is definitely foreclosed under the "general law" by the decisions of the Federal and state courts, *supra.*

Appellant would be in no better position if, by virtue of the "conflict of law rule", the Utah decisions controlled. In Utah, it is definitely held that the general rule that a litigant is not permitted to accept the fruits of a judgment and still prosecute an appeal from it, governs.

Sierra Nevada Mill Co. v. Keith O'Brien Co., 48 Utah, 12, 156 Pac. 943, 946, 947;

Ottenheimer, et al. v. Mountain States Supply Co., 56 Utah 190, 188 Pac. 1117, 1118;

Moon v. Bollwinkle, et al., 47 Utah 389, 154 Pac. 939, 940.

No matter what else may be said, the fact that the appellant accepted the benefits of the order of December 7th, 1942, in the manner as shown by the record here, forecloses him, under all the authorities, from prosecuting an appeal from that order.

(e) A Bill of Review, or a Bill in the Nature of a Bill of Review, Will Not Lie in This Case Because Appellant, Having Accepted the Benefits of the Order of December 7, 1942, Is Now Estopped From Reviewing Same; He Cannot Accept Its Benefits and Escape From Its Burdens.

Subdivision (b) of the prayer of appellant's petition reads as follows:

> "That this Court, as in the nature of a bill of review, or by an original bill in equity, review said petition filed herein by petitioner on October 15, 1937, and said order entered herein on December 7, 1942, and upon such review that this Court correct the errors of law and fact apparent in said order, and thereupon allow and award to petitioner compensation in such amount as now appears from the entire record herein to be just and proper" (618).

Appellant is estopped from reviewing the order of December 7th, 1942, because, having accepted the benefits of the order, he is estopped from reviewing it or from escaping from its burdens.

Hill, et al. v. Phelps, et al. (8 Cir.), 101 Fed. 650, 654;

Albright v. Oyster (8 Cir.), 60 Fed. 644;

Chase v. Driver, 92 Fed. 780, 786;

Brigham City v. Toltec Ranch Co., 101 Fed. 85;

Home St. Ry. Co., et al. v. City of Lincoln (8 Cir.), 162 Fed. 133;

Central Hanover Bank, et al. v. Wardman etc., 31 Fed. Supp. 685, 688.

In *Hill, et al. v. Phelps, et al., supra,* the Circuit Court for the Eighth Circuit, speaking through Circuit Judge Sanborn, said:

"There is another reason why the decree in this case cannot be reviewed. It is that *the appellees have paid, and the appellants have accepted, the entire debt which the decree was rendered to enforce. One who accepts the benefits of a verdict, decree, or judgment is thereby estopped from reviewing it, or from escaping from its burdens.*"

This, of itself, is sufficient to dismiss a bill in equity to review the order or a bill in the nature of a bill of review.

(f) A Bill of Review for Errors Apparent on the Face of the Record Will Not Lie After the Time Allowed for Appeal Has Elapsed.

In *Peeke v. Citizens Bank Company etc.* (6 Cir.), 81 Fed.(2) 112, it is held that ordinarily bills of review must be filed within time limited for appeal where review sought is not founded on new evidence discovered since decree.

19 *Am. Jur.*, Sec. 444, page 306;
Thomas v. Brockenbrough, et al., 23 U.S. 146, 150.

In *Jorgenson v. Young* (9 Cir.), 136 Fed. 378, the Circuit Court for the Ninth Circuit, speaking through Circuit Judge Ross, said:

"We are of the opinion that the judgment of the court below was right, for several reasons. The judgment in the original suit was entered February 1, 1902; the bill of review was not filed until April 11, 1904—*long after the time for an appeal from that judgment had elapsed. The rule is well settled in courts of equity of the United States that a bill of review must ordinarily be filed within the time limited by statute for taking an appeal from the decree sought to be reviewed, where the review sought is*

not founded on matters discovered since the decree. (Citing cases) This bill is not founded on matters discovered since the original decree, for it shows upon its face that the complainant 'surmised', when the alleged false testimony was given, that it was not true. It shows, moreover, that the facts which the complainant contends show it to have been false were, in part, matters of public record, of which the complainant had at least constructive notice, and of which he might have had actual notice by going to the recorder's office of the district. 'The newly discovered evidence which may form the basis of such a review must be not only evidence which was not known, but also such as could not with reasonable diligence have been found, before the decree was made.' ''

See, also:

Reed, et al. v. Stanley, et al. (9 Cir.), 97 Fed. 521;

Farmers & Merchants Bank v. Arizona M. & L. Ass'n (9 Cir.), 220 Fed. 1, 7;

Hagerott v. Adams (8 Cir.), 61 Fed.(2) 35, 36;

Blythe Co. v. Hinckley, et al. (9 Cir.), 111 Fed. 827, 837, 841;

Hendryx, et al. v. Perkins (1 Cir.), 114 Fed. 801, 804;

Chamberlin v. Peoria etc. (7 Cir.), 118 Fed. 32, 34;

Cocke, et al. v. Copenhaven, et al. (4 Cir.), 126 Fed. 145, 147;

In re Holmes, 142 Fed. 391, 393, 394;

In re Stearns & White Co., 295 Fed. 833, 839, 840;

Central Trust Co. v. The Grant Locomotive Works, etc., 135 U.S. 207, 227;

Taylor v. Easton, 180 Fed. 363;

Home St. Ry., et al. v. City of Lincoln (8 Cir.), 162 Fed. 133;

Cyc. Fed. Proc. (2d Ed.), Vol. 8, Sec. 3602, pages 350, 351.

(g) **A Bill of Review, or a Bill in the Nature of a Bill of Review, Will Not Lie Where No Fraud Is Alleged, or Where There Is No Newly Discovered Evidence Claimed, Unless There Is Error Apparent on the Face of the Record.**

Of course, in cases where a bill of review, or a bill in the nature of a bill of review, will lie, it is axiomatic that the decree or order must be final. Petitioner in his pleadings contends that the order of December 7th, 1942, *is not a final order.* If this be so (of course it is not), and if his petition be considered a bill of review or a bill in the nature of a bill of review, it should be instantly dismissed for that reason.

O'Brien's Manual of Federal Appellate Procedure (Third Edition, 1941), page 246;

First National Bank of Cincinnati, et al. v. Flershof, 290 U.S. 504; 54 Sup. Ct. 298; 90 A.L.R. 391.

In this latter case, Mr. Justice Brandeis, in delivering the opinion of the Court, held

> "that a bill of review is called for only after a final decree—one that finally adjudicates upon the entire merits, leaving nothing further to be done except the execution of it. (Citing John Simmons Co. vs. Grier Bros. Co., 258 U.S. 82, 88)."

In *Cyclopedia of Federal Procedure* (2nd Ed.), Volume 8, page 369, paragraph 3609, it is said by the author that,

> "The remedy (bill of review) is not available until the judgment in question has become final."

and apparently, as stated in the same section, that if the basis of the bill is not newly discovered evidence (and that is not claimed here), *the bill must be filed within the time to appeal;* and inasmuch as under Rule 60(b) a judgment may be set aside within six (6) months upon applicable grounds, *the remedy by bill of review for errors apparent on the face of the record is practically obsolete.*

It is well settled that a judicial decision which has been announced subsequent to the entry of the order or decree which changes the controlling rule of law is not the basis for a bill of review on the theory either that the decision constitutes new matter or that it demonstrates error apparent on the face of the decree.

19 *Am. Jur.,* page 298, par. 432;
30 *C.J.S.,* par. 646, page 1082;
Safeway Stores Inc. v. Coe etc., et al. (C.C.A. D.C.), 136 Fed.(2) 771, 773;
Wallace v. Franz (8 Cir.), 68 Fed.(2) 313, 314;
Miller etc. v. McCutcheon etc. (N.J.), 175 Atlantic 155; 95 A.L.R. 702, 708;
United States v. Haas (D.C. N.Y.), 58 Fed. Supp. 179.

In *Wallace v. Franz, supra,* it was held that litigation in another case resulting in a decree where it was shown that client received greater benefit from attorney's services, held not to present new matter or newly discovered evidence justifying bill of review to set aside decree fixing attorney's compensation.

Under the heading *"Vacation of Judgments—Bills of Review"*, there is a very good statement in Volume 8 of *Cyclopedia of Federal Procedure* (2nd Ed.), beginning on page 345, with a myriad of cases dealing with bills of review, and from a reading of the text, it indubitably appears that the appellant in the case at bar has misconceived his remedy, if any he now has. On page 348 of Volume 8, *Cyclopedia of Federal Procedure* (2nd Ed.), it is said:

> "Another distinction that was usually observed in equity practice prior to the adoption of the Rules of Civil Procedure was that between the application for rehearing and the bill of review. The application for rehearing was available during the term of rendition of the decree, but after expiration of the term application usually had to be by bill of review or independent suit to enjoin enforcement. Since, under the Rules of Civil Procedure, the term of court at which a judgment is entered no longer fixes the period of the court's primary control over the judgment, and *rehearing applications are placed upon the same basis as motions for new trial,* there is nothing to be gained by further pursuing distinctions, now of no moment, between rehearing applications and bills of review."

Of course, the time for a motion for a new trial or for a rehearing has long since passed. The time for filing a bill of review has also passed.

In *Hill, et al. v. Phelps* (8 Cir.), 101 Fed. 650, the Court quoted from the declaration by Lord Chancellor Bacon, in the first of his ordinances in chancery, the following:

> "No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of re-

view. And no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter, which hath arisen in time after the decree, and not any new proof, which might have been used, when the decree was made. Nevertheless, *upon new proof, that is come to life after the decree was made, which could not possibly have been used at the time when the decree passed,* a bill of review may be grounded by the special license of the court, and not otherwise.''

In *Fraser v. Doing* (C.C.A. DC.), 130 Fed.(2) 617, 620, the Court, in quoting from the Supreme Court of the United States, said:

''The Supreme Court has stated that:

'Bills of review are on two grounds: first, error of law apparent on the face of the record without further examination of matters of fact; second, new facts discovered since the decree, which should materially affect the decree and probably induce a different result.' A third ground, also, has been recognized, namely, fraud in procuring the decree. Appellant does not contend that there was fraud in the procuring of the decree or that any new matter of fact or evidence was discovered, after the entry of the decree, in Equity Cause No. 67317, which would probably induce a different result.

The only other issue which could have been presented to the District Court, in the present case, therefore, by bill of review or by complaint in the nature of a bill of review was whether there was error of law apparent upon the face of the record in Equity Cause No. 67317. Appellant has further defined that issue by his statement that: 'The genuine

issue in the case is whether the impeached decrees are valid, i.e., whether the Court which entered them possessed jurisdiction in personam over appellant.' ''

The appellant here cannot invoke either of these grounds —they are utterly lacking.

Whether order was right or wrong is no longer open to inquiry as time of appeal has passed and order was final in effect.

Concerning the order of December 7th, 1942, relating to the final allowance covering all services theretofore rendered by appellant "as set forth in his said petition (108-162) and as attorney for the former receiver", which appellant now claims was not in issue because not contained in the pleadings, appellee respectfully calls the Court's attention to a decision by the late Circuit Judge Gilbert in *Allen v. Allen, et al.,* 97 Fed. 525, 530, 531, in which it is held in effect that where a judgment is rendered on pleadings which presented no issue and might therefore be considered void, that if it was believed that the court erred in rendering such a judgment "the remedy was to have brought the matter before the appellate court on an appeal from the judgment".

Treinies, et al. v. Sunshine Mining Co., et al. (9 Cir.), 99 Fed.(2) 651, 655;

Roche v. McDonald, 275 U.S. 449, 454, 48 S.Ct. 142, 72 L.Ed. 365, 53 A.L.R. 1141;

Boundary County, Idaho, et al. v. Woldson (9 Cir.), 144 Fed.(2) 17, 19;

Wells Fargo & Co. v. City and County of San Francisco (Calif.), 152 P.(2) 625, 628.

(h) **The Time for Considering a Judgment or Order That Has Become Final Cannot Be Extended Unless a Motion to Review, Rehear, Modify, Revise or Vacate Such Order Has Been Seasonably Filed and That An Unseasonably Filed Motion or Petition, Although It May Be Considered on Its Merits, Cannot Have the Effect of Extending the Time to Appeal From the Original Order or Judgment.**

(i) **A Motion for Rehearing or a Motion for a New Trial Must Be Filed Seasonably and Within the Time Provided by the Rules of Civil Procedure.**

Irrespective of what counsel says, we believe it ridiculous to contend that after an order has become final and after the beneficiary of that order had accepted its fruits, that he can thereafter, by an out of time petition or motion, have that order reviewed, reheard, modified or revised, where no appeal had been taken within the time required by law. We believe there is no question but that where a petition such as this is filed for a rehearing, and denied, after the expiration of the period for appeal, the right to appeal cannot be revived. In the well considered case of *Safeway Stores Inc. v. Coe, etc., et al.* (C.C.A. D.C.), 136 Fed.(2) 771; 148 A.L.R. 782, note 795, the Court held that the time for taking an appeal is suspended by a *seasonably* filed motion for a new trial or a petition for a rehearing; but not an *unseasonably* filed motion or petition, although such motion or petition is considered on its merits. It appears in the *Coe* case that the complaint was dismissed on October 17th, 1941, and that on November 17th, 1941, Safeway Stores filed a motion for a rehearing, *which was considered* and denied on January 17th, 1942; on February 14th, 1942, Safeway Stores gave notice of appeal to the Circuit Court of Appeals for the District of

Columbia. Thereafter and on July 6th, 1942, the appellee filed a motion to dismiss the appeal on the grounds that the order of January 17th, 1942, was not appealable, and on the further ground that the time for taking an appeal from the order of October 17th, 1941, had expired. After discussing Rules 59 and 60 of the Federal Rules of Civil Procedure and stating that the order entered was a final and appealable order and a complete and definite disposition of the cause before the Court, the Court dismissed the appeal. In this case the Court discussed quite fully Rules 6, 59 and 60.

See, also:

Jusino, et al. v. Morales, etc. (1 Cir.), 139 Fed.(2) 946;

4 *Cyc. Fed. Proc.* (2nd ed.), page 310.

In the *Coe* case, *supra,* the cases of *Bowman v. Loperena,* 311 U.S. 262, 61 S.Ct. 201, *Pfister v. Northern Illinois Finance Corp.,* 317 U.S. 144, 63 S.Ct. 133, and *Wayne United Gas Co. v. Owens-Illinois Co.,* 300 U.S. 131, 57 S.Ct. 382, relied upon by appellant here, were thoroughly discussed and distinguished.

In the *Jusino* case, *supra,* the Circuit Court for the First Circuit, in considering a motion to reconsider and vacate a judgment which was entertained by the court below, distinguished the case of *Pfister v. Northern Illinois Finance Corp., supra,* and held that the appeal should be dismissed for lack of jurisdiction because not taken within the three (3) months' period allowed after the entry of judgment (28 U.S.C.A., Section 230), and called attention to the fact that while the motion for reconsider-

ation was filed and entertained by the court well within the period allowed for taking the appeal, it was not filed within the time provided by the Rules of Civil Procedure.

See, also:

Nachod & United States Signal Co., Inc., et al. v. Automatic Signal Corporation, et al. (D.C. Conn.), 32 Fed. Supp. 588;

Nachod & United States Signal Co., Inc., et al. v. Automatic Signal Corporation, et al. (D.C. Conn.), 26 Fed. Supp. 418.

In *Hill v. Hawes,* 64 Sup. Ct. 334, 149 A.L.R. 736, the Supreme Court of the United States reversed a judgment because, while the appeal was taken too late after the judgment could be considered entered, it was not considered properly entered because the Clerk failed to send notice of entry as provided by Rule 77(d) and in the manner specified by Rule 5 of the Federal Rules of Civil Procedure, and in that case held that a judgment does not become final for the purpose of starting the running of the period of appeal until notice is sent by the Clerk in accordance with the rule. Appended to the case of *Hill v. Hawes, supra,* in 149 A.L.R., there is a note, beginning on page 740, which has to do with the power of trial courts in an indirect manner of any kind extending the time for taking an appeal, particularly after the time for taking the appeal has already elapsed, so as to evade an express statutory requirement that the appeal must be taken within a certain time. In that note are cited many cases from the United States courts and from the state courts. (See, also; Note 89, A.L.R. 941; *Leishman v. Associated Wholesale Electric Co.,* 318 U.S. 203, Sup. Ct. 543.)

Rule 6, subdivision (b), provides for enlargement of time in certain cases, i.e. (1) with or without motion or notice, order that period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order. This can have no application because the petition was not filed within time. However, under (2), upon motion, the Court may permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but the Court may not enlarge the period for taking any action under Rule 59 except as stated in subdivision (c) thereof, *or the period for taking an appeal as provided by law.*

Adverting to Rule 59, subdivision (b) provides that a motion for new trial shall be served *not later than ten days after the entry of the judgment,* except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such ten day period *but before the expiration of the time for appeal.* Subdivision (c) of Rule 59, which is excepted in subdivision (b) of Rule 6, is inapplicable here.

Rule 60 is inapplicable because the motion was not made within six months after the order of December 7th, 1942, but irrespective of that, a motion under Subdivision (b) of Rule 60 does not affect the finality of a judgment. The portion of subdivision (b) of Rule 60, which does not limit the power of the court to entertain an action to relieve a party from a judgment or order is likewise inapplicable for the reasons stated in the *Coe* case, *supra.* It must be borne in mind that a petition for a rehearing under the Rules is in all respects the same as a motion for a new

trial and, as stated in that case, the purpose of Rule 6(b), which forbids the court to enlarge time for taking any action under Rule 59 regarding a new trial, was to divest the court of jurisdiction to entertain a motion for a new trial or a motion for a rehearing *filed out of time.* It also must be borne in mind that under former Equity Rule 69, rehearings were granted only upon such grounds as would authorize a new trial in an action at law. If the appellant's petition had been filed in time, the time for appeal might have been extended three (3) months after the disposition of the petition, but not otherwise. If the petition here had been granted, it would be tantamount to indirectly extending the time to appeal, which we do not think the court below had jurisdiction to do (*Paul v. Paul,* 28 Ariz. 598, 604, 238 Pac. 399).

As to relation of Rule 6(b) to Rule 60(b) on motion to vacate judgment, see 4 *Cyc. Fed. Proc.* (2nd Ed.), page 310.

By not appealing within the three months' period the petitioner lost his right to appeal (*DeJordan v. Hudspeth, etc.* (10 Cir.), 137 Fed.(2) 943).

In Arizona it is held that the common law doctrine that a court may set aside or modify a judgment is effective but it must be done within 6 months as provided by statute.[6]

6. *In re Ralph,* 49 Ariz. 391, 67 Pac.(2) 230; *Swisshelm Gold Silver Co. v. Farwell,* 59 Ariz. 162, 124 Pac.(2) 544; *Collister v. Inter-State B. & L. Assn.,* 44 Ariz. 427, 38 Pac.(2) 626, 98 A.L.R. 1020.

(j) Lack of Diligence in Filing Petition.

A delay from December 7, 1942, to March 31, 1944 (15 months), in filing a bill of review showed a lack of due diligence which barred review of order appealed from.

> "Assuming, without deciding, that a bill of review is the proper remedy for the relief sought, the court is of the opinion that, under the circumstances in this case, the delay in filing it, from May 18, 1938, to March 18, 1940, showed a lack of due diligence." (*Price v. National Surety Corporation of New York* (6 Cir.), 127 Fed.(2) 726.)

(k) The Failure of the Court to Find the Facts Specially and State Separately Its Conclusion of Law Thereon as Provided by Rule 52 Does Not Make the Judgment Void.

In *Monaghan v. Hill,* 140 Fed.(2) 33, 34, this Court, in a similar case, held that there was no error to call to the attention of the trial court under Rule 46 of the Rules of Civil Procedure because all of the evidence was presented by petitioners (including appellant) with no intervening exceptions, *except that the sum awarded was insufficient and that the court knew from the petition that petitioners though they were entitled to more than the amount of the judgment he awarded.*

In the instant case, the Court generally found that a reasonable compensation to the attorneys for their services rendered is $25,000.00, and that one-half of such amount was sufficient for the petitioner here. The Court further found that the sum of $7,344.00, covering salary and expenses of the petitioner here, was sufficient compensation as one of the attorneys for the former Receiver. In the order, the amount fixed for the petitioner Nealon was $12,500.00, less the sum already paid. Apparently,

there is no disputed question of fact and hence special findings and conclusions would be unnecessary. It must be remembered that the purpose of findings of fact is to enable appellate courts to ascertain the basis for the determination below and that where the appellate court can readily understand the questions presented, precise findings are not essential on all material issues, although they may be helpful. It must be remembered that this Circuit Court in the *Monaghan* case, *supra,* did not think that findings were essential because the only issue was the amount of the judgment. (See top of page 34, 140 Fed(2).)

It seems that the question of the necessity for special findings has arisen a number of times in cases where an involuntary dismissal at the close of the plaintiff's case is granted pursuant to Rule 41(b). Since, on such a motion, the facts are not in issue, it would seem that there is no necessity for findings. In *Thomas v. Peyser,* 118 Fed.(2) 369, the Court of Appeals for the District of Columbia held as follows:

> "There is no merit in appellants' contention that the trial court should have made findings of fact. Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, requires findings 'in all actions *tried upon the facts'* (italics supplied). This case was not tried upon the facts. The facts were admitted by the motion to dismiss. Obviously there need be no fact findings where the facts were not in issue. The only issues determined by the trial court were questions of law and these adequately disposed of the case."

Even if the facts were contested, it would seem that where the petitioner knew of the judgment and accepted

the fruits thereof without any complaint as to lack of special findings and without any complaint as to the judgment until some fifteen (15) months after its entry, he should not now be in position to complain. *At all events, findings or no findings, the judgment should have been appealed from within the time provided by statute, as it was final under the law.*

It is certain that if the *Monaghan* case, *supra,* had arrived in the Circuit Court of Appeals without findings, the result would have been the same, because, as stated by that Court:

> "There was no error to call to the attention of the trial court * * * except that the sum awarded was insufficient, and the Court knew from the petitions that petitioners thought they were entitled to more than the amount of the judgment he awarded."

In *Hurwitz v. Hurwitz* (C.C.A. D.C.), 136 Fed.(2) 796, 799, the Court said:

> "* * * Their purpose is to aid appellate courts in reviewing the decision below. In cases where the record is so clear that the court does not need the aid of findings it may waive such a defect on the ground that the error is not substantial in the particular case. That is the situation here. The trial court's charge to the jury discloses adequately the issues of fact which were before the court and jury, and upon a review of the evidence we would reach the same result as that reached by the jury. Therefore, it is immaterial whether the cause below was in equity or at law. In either case a judgment following the verdict of the jury should be sustained."

See, also:

Stoltz v. U. S. (9 Cir.), 90 Fed.(2) 283, 284;
Jackson Co. v. Alton, etc. (8 Cir.), 105 Fed.(2) 633;
Goodacre v. Panagopoulos (C.C.A. D.C.), 110 Fed. (2) 713;
Mass. Bonding & Insurance Co. v. Preferred Auto. Insurance Co. (6 Cir.), 110 Fed.(2) 764;
Girard Trust Company v. Amsterdam, et al. (5 Cir.), 128 Fed.(2) 376.

In 4 *Corpus Juris Segundum,* at page 827, the author states that a motion for a new trial is often regarded as prerequisite to review the trial court's failure to make findings of fact or conclusions of law and that an objection based on the refusal or failure of the court to make findings of fact or conclusions of law, even in the case of a refusal of a special request for findings or the failure to make any findings, may be disregarded on appeal unless presented to the trial court by a motion for a new trial or in some other way in accordance with applicable practice.

See, also, in this connection:

3 *Corpus Juris,* page 984, Paragraph 902;
U. S. v. Mitchell (8 Cir.), 104 Fed(2) 343.

Of course, we realize that the Circuit Courts have at various times sent cases back for special findings but this is because the appellate court could not readily grasp the situation presented without findings. Such is not the case here, because the only question is "was the fee awarded sufficient?", and no complaint has been made on that score until now. Petitioner now claims he got too little and we

claim he is too late. In any event, no appeal was taken, and he, until now, concurred in the order by accepting the benefits thereof.

CONCLUSION

Appellee believes that he has pointed out that a motion for a new trial, rehearing, or to vacate or modify the order of December 7th, 1942, is too late.

Appellant seeks to review that order by a petition to review and rehear same and asks the lower court to vacate same for want of jurisdiction of the court to render said order and asks the court to enter a supplemental order allowing and awarding appellant compensation *"in such amount as now appears from the entire record herein to be right and proper"* (618). He also asks the court to review the order to "correct the errors of law and fact *apparent* in said order". Appellee has shown that this cannot be done because there is no error apparent in said order and furthermore the petition is too late. Appellee has pointed out, *supra,* that a change in the law by a later decision avails appellant nothing. He has accepted the full benefits of the order with full knowledge of its portent. No matter whether the court is bound by the Arizona or Utah decisions or by "general law", the ultimate result must be the same.

Appellant does not claim newly discovered evidence. He relies on newly discovered law, i.e., the *Monaghan* case, *supra.* He does not rely on fraud, and under the record here, no one in his sound senses could claim fraud. If after-discovered fraud were shown, he could have equitable relief against a fraudulent order irrespective of the

fact that 15 months had elapsed between the date of the final order and the time appellant's petition was filed (*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997).

Appellant has cited three (3) fairly late decisions by the Supreme Court of the United States, i.e., *Bowman v. Lopereno, Pfister v. Northern Illinois Co.*, and *Wayne United Gas Co. v. Owens-Illinois Co., supra.*

These last mentioned cases, one of which was from this Court, all relate to bankruptcy and are distinguishable from the case at bar. This is pointed out in *Safeway Stores Inc. v. Co., etc., et al., supra,* and in the note to that case in 148 A.L.R., beginning on page 795. The distinguishing features of the three (3) bankruptcy cases, *supra,* are carefully pointed out by Chief Justice Groner in the *Coe* case, *supra.*

Other cases relied upon by appellant are not controlling here because, in view of the record, they are clearly distinguishable.

It is respectfully submitted that the attempted appeal by appellant should be dismissed and in all events the order of the court below denying and dismissing the petition should be affirmed.

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